U.S. Department of Labor **Office of Administrative Law Judges**
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Issue date: 25Jul2001

In the Matter of	:	
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LUIS A. OSUNA	:	
Claimant	:	
	:	Case No.: 1999-LHC-01366
v.	:	1999-LHC-01367
	:	1999-LHC-01368
NATIONAL STEEL AND SHIPBUILDING CO.	:	
Employer	:	

Timothy L. Brictson, Esq.
San Diego, CA
For the Claimant

Roy D. Axelrod, Esq.
Solana Beach, CA
For the Employer

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER[1]

This is a claim for compensation for both temporary and permanent disability arising under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901 *et. seq.* (hereinafter "the Act"). A formal hearing was held in San Diego, California on July 26-27, 2000 and December 11, 2000. Three of the Employer's witnesses subpoenaed to testify on July 27 failed to appear on that date, and Employer moved to have the subpoenas enforced as provided by Section 27(b) of the Act. Accordingly, I certified the matter to the Chief Judge of the District Court for the Southern District of

[1] The following abbreviations will be used when citing to the record in this case: EX–Employer's Exhibit; CX–Claimant's Exhibit; JX–Joint Exhibit; ALJX–Administrative Law Judge Exhibit; and TR–Hearing Transcript.

California, who held a hearing and ordered the subpoenaed witnesses to testify when the hearing recommenced, which they did (*see* ALJX 1-3).

At the hearing in July, the parties agreed to the following stipulations: Claimant suffered an injury to his right shoulder arising out his employment on January 4, 1994; an Employer/Employee relationship existed at the time of this injury; Claimant's average weekly wage at the time of that injury was $491.82; Claimant provided timely notice of his January 4, 1994 injury; and Claimant was provided compensation from Employer for this injury as reflected in Employer's Exhibit 5[2] (TR 30-35). On July 27, the parties further stipulated that Claimant sustained a work-related cumulative trauma injury to his right elbow through October 10, 1995, and that Claimant provided timely notice and filing for this injury (TR 303).[3] The parties had earlier stipulated that if claimant had sustained a cumulative trauma injury to his right elbow through October, 1995 that his average weekly wage for this injury was $609.80 (TR 36-37). In addition, at the July hearings Claimant's Exhibits 1-3, 5-9, 11-21, and 23-25; Employer's Exhibits 1-28 and 30-36; and Joint Exhibit 1 were admitted into evidence. At the December hearing, Claimant's Exhibit 26 was admitted. The record remained open for a video surveillance tape of Claimant, which is admitted as Employer's Exhibit 37; updated LS-208 forms, which are admitted as Employer's Exhibit 42; the deposition of Dr. Ornish, which is admitted as Employer's Exhibit 43; LS-200 forms, which are admitted as Joint Exhibit 2; and Mr. Osuna's business card, which is admitted as Joint Exhibit 3. Claimant also submitted as attachments to his post-hearing brief, signed copies of two LS-200 forms, one of which is contained in Joint Exhibit 2 and another dated June 29, 2000. For the sake of completeness, these documents are admitted into evidence as Claimant's Exhibit 28.

Claimant contends that he is entitled to compensation for temporary and permanent disability resulting from several alleged injuries while he was employed with NASSCO. First, Claimant injured his right shoulder in a fall on January 4, 1994. Claimant asserts that subsequent to this accident, he developed a cumulative trauma injury to his right shoulder through November 6, 1996 because his regular work at NASSCO was beyond his physical abilities, and that he suffered an unrelated cumulative trauma injury to his right elbow as result of repeatedly bumping his elbow at work until October 1995. Employer has stipulated to the January 4, 1994 shoulder and October 1995 elbow

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[2] Claimant contends that one check from Employer was never received, and requested that it be reissued (TR 33-34). At the hearing, he did not clarify which check was allegedly missing.

[3] Curiously, both parties argue in their post-hearing briefs as if no stipulation on this issue had been reached. However, there is no doubt that the parties agreed, on the record, that the claimant sustained a work-related cumulative trauma injury to his right elbow through October 10, 1995. Since neither party moved to be released from the stipulation, it is binding on the parties.

injuries, but argues that Claimant is not a reliable witness, and that his complaints of pain and disability cannot be credited.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Claimant is a 36 year old former longshoreman. He is not a United States citizen, but he has had a Green Card for 18 years (EX 31, at 19). He testified that his wife has left him several times as a result of domestic violence, but at the time of the hearing he was living with her and their three young children. Claimant was born in Mexico and was educated there until he moved to the United States. He attended grades nine through twelve in a United States high school, and graduated in 1982. Following high school, he completed two college courses, which were taught in English, and received passing grades in both (EX 31, at 19). More recently, he has completed courses in child development, real estate, property management, and computer literacy, all of which were taught in English (EX 31, at 40-44). Prior to working at NASSCO, Claimant worked in general maintenance and as a painter (EX 14, at 243).

Claimant began working for Employer in 1989. He was initially employed as an ironworker helper (EX 14, at 245), and was classified as a shipfitter at the time of his first injury. On January 4, 1994, Claimant was descending a ladder and slipped on a paint can or bucket hanging on a step, falling to the ground and landing on his shoulder (EX 17, at 156). Claimant stated at different times that he fell six feet and fifteen feet (EX 14, at 85; CX 12, at 43; EX 35, at 205). At one point he also indicated that he had a "fainting spell" as a result of the fall, and reported the injury only after he regained consciousness (EX 31, at 102). No one witnessed the accident. Claimant was sent to the medical dispensary upon reporting the accident, where he was diagnosed with a shoulder strain (EX 17, at 156; EX 45). After missing one day of work, Claimant was placed on light duty (*id*. at 157). He then came under the care of Dr. Dickinson, who kept him on light duty. Dr. Dickinson determined that Claimant was permanent and stationary on May 11, 1994 (EX 13, at 82). He reported that Claimant had had a slight acromioclavicular ("AC") joint tear, which was visible on x-ray (EX 13, at 83). He stated that Claimant had had several injections into his AC joint, which had provided some relief from pain. He limited Claimant to no "very heavy lifting above the level of the right shoulder" (EX 13, at 84).

Claimant was also examined by Dr. Averill twice in the spring of 1994. In his March 11, 1994 examination, Dr. Averill diagnosed Claimant as having a "first degree acromioclavicular separation" of the right shoulder (EX 14, at 88). Dr. Averill noted that Claimant evidenced a lack of grip strength in

his right hand, but credited this to Claimant's "lack of effort" (EX 14, at 88). Dr. Averill again examined Claimant at the end of May 1994. He determined that Claimant's condition had become permanent and stationary, producing a 5% impairment to his right upper extremity, and stated that Claimant could perform his usual work (EX 14, at 92-93).

Claimant returned to his regular duties, but soon was laid off from work at NASSCO in April 1994 because of a reduction in the workforce; he was called back to work in June 1994 (EX 24, at 253, 254). In November 1994, Claimant was evaluated by Dr. Greenfield. Dr. Greenfield stated that Claimant's AC separation injury was permanent and stationary, and noted that Claimant should avoid repetitive lifting of more than 40 to 50 pounds above the right shoulder (EX 12, at 71). He too stated that Claimant was able to continue in his regular work, and gave Claimant the same impairment rating as Dr. Averill (*id*.).

Claimant apparently did not seek further medical treatment until he saw Dr. Greenfield again on July 27, 1995, at which time he was complaining of pain in his right bicep (EX 11, at 42). Dr. Greenfield determined that Claimant had bicipital tendinitis in his right arm. Claimant returned to NASSCO's medical dispensary the next day complaining of pain in his shoulder as well as his right arm (EX 17, at 162). Dr. Greenfield placed Claimant on light duty, and Claimant was transferred to the maintenance department to comply with his restrictions (EX 11, at 42-43; TR 221-23). Claimant continued in treatment with Dr. Greenfield for his shoulder pain. In September 1995 Dr. Greenfield's notes reflect that he gave Claimant a right elbow pad to wear while working, and on October 12, 1995 Claimant underwent surgery to remove an olecranon spur on his right elbow (EX 11, at 47). He received compensation for total disability from October 12 through October 30, 1995 (EX 45, at 3). Dr. Greenfield reported that Claimant healed well following the surgery, and he returned him to full duty on December 7, 1995 (EX 11, at 48). On February 27, 1996, Dr. Greenfield rated Claimant with a 15% impairment of his right upper extremity (EX 12, at 77). Although Claimant was no longer on light duty, he remained working in the maintenance department, where the work was lighter than regular shipfitting, until his termination in November 1996 (TR 221).

In his March 10, 1996 report, Dr. Greenfield concluded that Claimant was permanent and stationary as of his February 27, 1996 evaluation, but that Claimant's elbow injury did not result in any permanent impairment (EX 12, at 76, 79). Claimant returned to Dr. Greenfield in late July 1996 complaining of pain in his right elbow. Dr. Greenfield diagnosed Claimant with right elbow epicondylitis,[4] and placed Claimant on temporary disability from August 15, 1996 through September

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[4] Epicondylitis is inflammation of the epicondyle or tissue of the epicondyle, which is the bony projection of the humerus, the bone of the upper arm. *See Dorland's Medical Dictionary* (28th ed. 1994); *see also CancerWeb: Online Medical Dictionary* (visited June 26, 2001)

2, 1996 (EX 45, at 4). In October, Claimant again complained to Dr. Greenfield of loss of strength in his right shoulder and burning in his right elbow (EX 11, at 53). Dr. Greenfield diagnosed ulnar nerve neuropathy for the first time (*id*.)

Despite Claimant's complaints of pain to Dr. Greenfield, the doctor did not place Claimant under any medical restrictions and Claimant remained on full duty from early September 1996 to the time of his termination (EX 11, at 52-54). His working foreman, Frank Kingman, and the general supervisor of the maintenance department, Joe Reap, testified that they never observed Claimant to be in any pain and that he never mentioned any pain while working (TR 223, 310-12). David Aguilar, a co-worker who worked side by side with Claimant, testified similarly (TR 175). In addition, although Claimant frequently visited the medical dispensary throughout his employment at NASSCO for a variety of infirmities, he did not go to the medical dispensary complaining of elbow or shoulder pain between November 1995 and his termination a year later (EX 17). Claimant testified that he did in fact tell his foreman and "the medical department" that his pain was increasing (TR 83), but the other witnesses' testimony and Claimant's records from Employer's medical dispensary refute Claimant's testimony.

Claimant was terminated from employment with NASSCO on November 8, 1996 for fighting at work (EX 24, at 259). Claimant testified inconsistently about the fight. At his deposition, Claimant testified when asked if he got in a physical fight with Mr. Aguilar, "[n]ot exactly, but–yes, it was pushing and bad words because we had a problem" (EX 31, at 72). At the hearing, he stated that Mr. Aguilar, was "giving me a lot of stress" and "calling me all kinds of names" (TR 84-85). Claimant testified that his temper flared and he "grabbed a pipewrench to make the other guys run," which they did (TR 84-85). Claimant testified that Mr. Aguilar also attempted to run, but that he blocked his way and closed the gate so that he could not leave (TR 85). He further testified that he threw the pipewrench and challenged Mr. Aguilar to fight. According to Claimant, Mr. Aguilar then grabbed a hose and hit him in the face with it, and that "I had to grab him and [throw] him on the floor" (TR 85-86). Client admitted that he punched Mr. Aguilar and jumped on top of him while he was on the ground. He denied that he was punching Mr. Aguilar while he was on top of him, however, saying that he was struggling with him to get the hose out of his hand (TR 124). Mr. Kingman testified that Claimant had Mr. Aguilar on the floor and was "working him over a little bit" (TR 226). Mr. Aguilar testified that the fight began with Claimant holding the 22 inch wrench in his right hand and swinging it over his head (TR 178-79). He stated that at the time Claimant rushed at him he was reaching toward his tool box and that he might have had something in his hand during the fight, but did not recall that he was holding a hose (TR 181-82, 191). According to the medical dispensary records and Mr. Workman's investigatory notes, both workers received minor injuries (EX 25; EX 26, at 271).

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http://www.graylab.ac.uk/omd/index.html.

Both workers were fired after the fight. Mr. Aguilar filed a grievance to get his job back (TR 184). His grievance was initially denied, but was granted the second time he filed. He returned to work about a month after being fired (TR 185). Claimant also filed a grievance to regain his employment (TR 128). He did not mention any shoulder or elbow pain in this grievance, and desired a reinstatement to his usual work, not modified work (TR 128). Like Mr. Aguilar's first grievance, Claimant's grievance was denied. Claimant did not file another grievance. In addition, although he testified at his deposition that he only filed for unemployment once in 1994 (EX 31, at 82), and testified at the hearing that he "[couldn't] remember" if he filed for unemployment following his termination, in fact Mr. Osuna filed an unemployment claim following his termination, which was granted (TR 130; EX 24, at 260). Employer appealed the claim, but withdrew the appeal without explanation (EX 24, at 264-65).

Although both men were fired, Mr. Osuna repeatedly stated that he did not think his termination was fair because "I got fired and the other man wasn't fired" (TR 84) and even

suggested in his post-hearing brief that the firing was "selective and discriminatory." He enumerated no specific improper motive in firing him, but stated that Employer did not show that it acted in good faith in terminating him. *See Claimant's Post Trial Brief*, at 14.

Claimant continued in the care of Dr. Greenfield after his termination from NASSCO. In early January 1997, Dr. Greenfield stated that Claimant had right shoulder impingement syndrome, and suggested that Claimant undergo arthroscopic surgery on his shoulder for a subacromial decompression (EX 11, at 56). This surgery was performed on February 2, 1997 (EX 11, at 58).[5] Dr. Greenfield's notes reflect that Claimant did not improve as quickly as expected following his shoulder surgery (EX 11, at 58-65). In July 1997, Dr. Greenfield again started treating Claimant's elbow in addition to his shoulder (EX 11, at 66). He diagnosed Claimant as having right olecranon bursitis.[6] In late September 1997, Dr. Greenfield suggested another surgery on Claimant's right elbow, but before he performed it Claimant changed physicians (EX 11, at 68). Dr. Greenfield had indicated that Claimant should remain off work from the time of his shoulder surgery to the end of his treatment in September 1997.

Claimant came under the care of Dr. Levine in October 1997 (CX 12, at 42). Dr. Levine

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[5] Employer paid benefits for temporary total disability from February 2, 1997 to February 22, 1998 following this procedure (EX 42, at 1).

[6] A bursa is a fluid-filled sac that functions as a gliding surface to reduce friction between moving tissues. The bursa at the tip of the elbow is called the olecranon bursa. Bursitis is the inflammation of a bursa. *See Dorland's Medical Dictionary* (28th ed. 1994); *see also CancerWeb: Online Medical Dictionary* (visited June 26, 2001) http://www.graylab.ac.uk/omd/index.html.

continued Claimant on temporary total disability, and Claimant underwent an additional elbow surgery on January 7, 1998 (CX 12, at 35). Dr. Levine reported that Claimant recovered well from this surgery, although Claimant told him he was still not working (CX 12, at 36). Dr. Levine stated that Claimant was capable of modified work as of February 20, 1998 (CX 12, at 36-37), and as of May 25, 1998, Dr. Levine stated that Claimant had recovered well and could return to work without restrictions, although Claimant had reported to him that he was still not working (CX 12, at 29-30). On June 16, 1998, Dr. Levine determined that Claimant's condition was permanent and stationary (CX 12, at 25). Dr. Levine gave Claimant a 20% impairment to his right upper extremity due to Claimant's elbow injury (CX 12, at 17). He stated that Claimant's disability precluded "more than occasional overhead work activities such as pushing or pulling or lifting or similar type activities" and "a disability between very forceful activities and forceful activities" (CX 12, at 25). Dr. Levine also asserted that Claimant was a candidate for vocational rehabilitation. Despite Dr. Levine's assertion that Claimant could no longer carry out his regular duties, on June 24, 1998, Claimant reapplied at NASSCO for the position of shipfitter, which indicates that Claimant believed he was capable of carrying out his former duties (EX 24, at 267).

Claimant was again examined by Dr. Averill on June 15, 1998, one day before Dr. Levine conducted his permanent and stationary evaluation. Claimant told Dr. Averill that he had not worked since getting "laid off" (EX 14, at 95). Dr. Averill noted that Claimant lacked some shoulder flexion (EX 14, at 97), but had normal tone and strength in his muscles and normal nerve reflexes (EX 14, at 98). Dr. Averill stated that Claimant had developed chronic bursitis from cumulative trauma from 1992 (EX 14, at 99) and right shoulder problems including chronic impingement syndrome and residual adhesive capsulitis resulting from his January 1994 fall (EX 14, at 99). Dr. Averill believed that Claimant could continue to perform his regular shipfitter work as long as he did not have to perform "very forceful squeezing, gripping and pulling and very heavy lifting activities" (EX 14, at 101). He calculated Claimant's impairment to the right upper extremity to be 10% based on loss of grip strength (EX 14, at 101). He credited Claimant's elbow injury to be responsible for half of his loss of grip strength and his shoulder injury to be responsible for half of his loss (EX 14, at 103). Thus, according to Dr. Averill, the Claimant has a 5% impairment of the upper extremity related to his right elbow injury (EX 14, at 103).

Following the two doctors' permanent and stationary ratings, Claimant was evaluated by Joyce Gill, a vocational rehabilitation specialist, on August 25, 1998 (EX 23, at 222). Ms. Gill also testified at the hearing regarding her findings (TR 406). Claimant spoke with Ms. Gill about his education, skills, work history, and medical history. He told Ms. Gill that English was his primary language (EX 23, at 222), and Ms. Gill stated that Claimant had no problems communicating with her (TR 413). Ms. Gill did not test Claimant's fluency in English, however (TR 521-30). Claimant indicated at his deposition that he had some difficulty communicating with Ms. Gill and that they had to communicate with their

hands (EX 31, at 120). He stated at the hearing that he could communicate orally, but that he had a "disability problem with my reading and writing" (TR 118). In addition, Claimant's self-assessed physical limitations were significantly more restrictive than the physicians' restrictions. He stated that he could only lift and carry 5-10 pounds with his right hand and that he would lose his grip and drop items such as a gallon of milk (EX 23, at 225); that he had extreme pain when reaching overhead; that he had pain reaching forward between his shoulder and waist; that he had difficulty gripping ladders; that he became fatigued from keeping his arms extended when driving; and that he had decreased grip strength (EX 23, at 226). He reported no difficulties with bending, twisting, standing, walking, sitting, climbing stairs, stooping, balancing, breathing, seeing, or hearing (EX 23, at 226). Claimant also stated that he did no yard work, but that he hired workers and occasionally helped them (EX 23, at 226). In her September 1998 survey, Ms. Gill based her assessment of Claimant's physical abilities on Drs. Levine and Averill's restrictions. She stated that Claimant was capable of performing the work of a pest control technician, automobile rental clerk, or customer service representative, which are classified as light work or sedentary work (EX 23, at 229-39). In her supplementary report of September 1999, Ms. Gill added to this list the jobs of Building Maintenance Repairer and Property Manager, which are classified as light work (EX 32, at 154, 164).

At the hearing, Ms. Gill further stated that it was her professional opinion that Claimant was capable of performing his regular work at NASSCO (TR 419). At the time of his termination, Claimant was working as a shipfitter in the maintenance department. Ms. Gill testified that the physical duties of this job were less strenuous than the physical duties of a shipfitter working on a ship, and that Claimant's job in the maintenance department fell within the medical restrictions placed by Drs. Dickinson, Greenfield, Levine, Averill, and Dodge (TR 416, 419-24, 443). Ms. Gill explained the duties of a shipfitter in the maintenance department in her 1999 report (EX 32, at 149). She stated that maintenance department work was diverse, ranging from repairing gas leaks to laying tile to gathering stray cats (EX 32, at 149). Several other witnesses testified regarding Claimant's work as well. Claimant testified that his regular work required him to independently lift up to 200 pounds, to frequently use a 30 to 40 pound grinder over his head, and to use a torch for welding (TR 76-79). At the hearing he stated that he was no longer able to use the grinders, engage in overhead work, or lift heavy materials (TR 98-99). He further stated that he performed his regular work from when he was rehired after his layoff until his termination (TR 103-04). Mr. Aguilar testified that workers in the maintenance department would be required to use a jackhammer for up to one hour and to lift up to 90 pounds, although they were specifically and repeatedly instructed to seek assistance with heavy lifting, and had equipment to lift and carry some heavier materials (TR 197-209, 213). Mr. Aguilar also said that on one occasion he worked with Claimant on a job that required about 15 to 20 minutes of overhead work at a time and lasted over eight hours (TR 197-98). Mr. Reap testified that the maintenance department work was considerably lighter work than shipfitter work in the yard, with less heavy lifting (TR 309). He also stated that lift trucks and other equipment were available to aid in

heavy lifting, and that no employee would be required to lift 200 pounds by himself (TR 318).

Despite Employer's present contention that Claimant could perform his regular work, Claimant began a vocational rehabilitation program with Roberto Cruz in late November 1998. Mr. Cruz repeatedly stated throughout his report that Claimant had a "good level of verbal communications skills (English and Spanish)" (CX 16, at 1,3, 5, 6, 7). Claimant also told Mr. Cruz he had some self-imposed restrictions that he did not communicate to Ms. Gill and that no doctor imposed, saying that he could only sit or drive for 30 minutes, stand for 45 minutes, walk for 20 minutes, and climb steps and bend only "guardedly" (JX 1, at 3; EX 32, at 148; TR 433). Following his meeting with Mr. Cruz, Claimant began classes in real estate and property management and basic computer training (CX 16, at 10).

Claimant participated in vocational rehabilitation through the spring of 1999. At the hearing he testified that he could not have worked during this period because his studies occupied much of his time (TR 88, 118). He attended class Monday through Friday from 8:00 to 12:00, and Thursdays from 12:00 to 3:30, and Wednesday from 6:30 to 10:00 (CX 16, at 11). He also visited Dr. Levine again in January 1999, over six months since his previous visit. In February, he complained to Dr. Levine that using a computer was hurting his elbow (CX 12, at 11). He continued to report pain in his elbow extending down to his fingers, and Dr. Levine recommended a neurological exam (CX 12, at 8). Dr. Schleimer, a neurologist, performed this
exam on July 6, 1999 (EX 16, at 129). He diagnosed Claimant with ulnar neuritis, although he

noted that Claimant's nerve conduction studies and EMG were normal (EX 16, at 135). Claimant underwent surgery to relieve pressure on his ulnar nerve on November 17, 1999 (CX 26, at 65; CX 12, at 1C). Dr. Levine indicated that Claimant continued to complain of pain in his shoulder, elbow, and hand following the surgery (CX 12, at 1C-1E). In March 2000, Claimant complained that the pain in his right wrist awakened him at night, his hand cramped, and his grip was weakening (CX 12, at 1E). Dr. Levine stated on June 30, 2000 that Claimant was again permanent and stationary, but did not alter his disability rating from his 1998 report (CX 12, at 1I).

Dr. Larry Dodge also examined Claimant several times throughout the winter and spring of 2000. In his February 2000 report, Dr. Dodge reported that Claimant had a full range of motion in his right shoulder and that the impingement and apprehension tests were normal (EX 30, at 300). Claimant had no mechanical loss of range of motion in his elbow, although he complained of pain in his elbow. Dr. Dodge believed that Claimant's neural pain was secondary to scarring from the right olecranon bursectomy (EX 30, at 302). He noted that Claimant's grip strengths were 20-20-20 pounds in the right arm, and 135-145-155 pounds in the left (EX 30, at 300). He noted that Claimant seemed to have recovered fairly well from his January 1994 injury, but that after Claimant was terminated he began to develop ulnar nerve irritation. He added that, "[u]nfortunately, at this time, the patient is

actually doing poorly after the most recent surgery of Dr. Levine" (EX 30, at 301). After reviewing two additional medical reports of Dr. Levine, Dr. Dodge stated that Claimant's shoulder injury from January 1994 was permanent and stationary, and that "[t]here is no support that this patient has had a further continuous trauma injury" (EX 30, at 304).

Dr. Dodge again saw Claimant on April 28, 2000, when he declared Claimant's elbow injury to be permanent and stationary (EX 30, at 306). His examination revealed similar results as in February although Claimant's grip strengths were slightly changed, at 54-45-58 on the right and 128-128-115 on the left (EX 30, at 309). He specifically noted that he did not feel that Claimant had "put forth a complete effort in grip strengths of the right hand" (EX 30, at 311). Claimant had normal intrinsic muscle strength in the right hand, although he had slightly diminished sensation in his 4th and 5th fingers (EX 30, at 309). Claimant's arm muscles were even on the left and right. Dr. Dodge diagnosed Claimant with olecranon bursitis, right shoulder contusion and strain, and ulnar nerve irritation (EX 30, at 309). He further stated that he believed all of Claimant's symptoms grew out of his January 4, 1994 injury, and that there was no support for the theory of cumulative trauma to his elbow. Based on Claimant's subjective complaints of pain and on the objective findings of decreased grip strength, diminished sensation in the 4th and 5th fingers of the right hand, normal nerve conduction study and EMG, and unrestricted range of motion, Dr. Dodge stated that Claimant was restricted from frequent overhead work and "forceful gripping and grasping with the right upper extremity" (EX 30, at 310). He rated his impairment at 19% of the upper extremity, based on a 10% impairment in the right shoulder and a 10% impairment based on loss of grip strength in the right hand (EX 30, at 311). However, Dr. Dodge dramatically changed his opinion after viewing a surveillance tape of Claimant taken on April 19, 2000 (discussed *infra*), stating that Claimant had clearly fully recovered from any injury suffered at NASSCO and had no work restrictions (EX 30, at 316-17).

Employer had Claimant surveilled over three days ending on April 19, 2000, and submitted a videotape of Claimant's activities (EX 37). The tape was viewed by Ms. Gill and Dr. Levine in addition to Dr. Dodge, and I reviewed it in my chambers. The tape raises serious issues regarding Claimant's physical abilities and his work during and since his employment with NASSCO. Claimant repeatedly told his physicians that he was not working and that he was not able to work, and even stated at one point that he was not even able to pick up a piece of paper without feeling pain, and would drop objects the size of a gallon of milk because of weakness. Only a month before the video was filmed, Claimant had complained to Dr. Levine that the pain in his right wrist awakened him at night, his hand cramped, and his grip was weakening (CX 12, at 1E). However, the video shows Claimant performing significant physical activities with no apparent pain. Employer's investigator filmed Claimant loading objects into a red truck a little before 9 a.m. on April 19, 2000. The video then begins again at 10:00 a.m., and shows Claimant and several other men already engaged in work, apparently building a patio in a back yard. The video continues until about 3:00 p.m., with one hour-

long break. It shows Claimant working steadily throughout the day. He repeatedly shovels dirt or sand, lifts and carries large stones, breaks rocks with a sledgehammer, pounds rocks into place on the patio using a larger rock, a large metal tool, or his hand, and reaches out to work with his hands between shoulder and waist level. At one point, he and another man lift a large beam up to shoulder level. Many of Claimant's movements involve repeated bending and extension of his right elbow and gripping, lifting and pounding, which he performs with no apparent pain, discomfort, or disability.

When questioned regarding the video, Claimant testified that he works as a contractor,[7] but hires other men to do the actual work, and only directs them. He stated that the work he is shown performing on the video is not typical, but he needed to work to "bring some money and food to the table" (TR 96). However, beyond just performing the work, Claimant appears to perform it with facility. He is even shown taking a brief break from work, which would seem to be a typical time where a person overextending his physical capabilities might show some signs of physical pain, such as holding or rubbing his elbow, arm or shoulder. Claimant shows no such evidence of pain. He also testified that the project on the video took about two weeks to complete, which indicates that Claimant performed this level of physical activity consistently for an extended period of time (TR 145).

Ms. Gill noted many inconsistencies between Claimant's description of his pain to her in 1998 and his activity on the video (TR 428-30). She pointed out that Claimant told her "he experienced pain with reaching forward between shoulder and waist. He did that constantly and repetitively over a three hour period" on the video (TR 429). Further, he had reported "fatigue with extending his arms for extended period" but worked a significant amount of time with his arms extended well beyond his body on the film (TR 429). He was also seen climbing a ladder, which he told Ms. Gill he could not do because he would lose his grip.

Dr. Levine also viewed the surveillance film, and noted that Claimant is shown doing "repetitive kneeling, bending, standing, walking, stooping, swinging of a sledgehammer to break rocks, pounding, reaching, climbing a ladder, and balancing. The patient was utilizing his right upper extremity *with no apparent restrictions or reservations*" (CX 12, at 1G) (emphasis added). However, at his deposition, Dr. Levine stated that Claimant was holding the sledgehammer very close to his body, indicating some guarding from pain or weakness in the right arm (CX 26, at 23). He stated that the video showed no activity outside the restrictions he had placed (CX 26, at 24). The video did not alter his assessment of Claimant's disability. Even after viewing the video, he specifically noted that he felt Claimant was a credible historian (CX 26, at 41).

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[7] Indeed, it would be difficult for Claimant to deny that he works as a contractor, as his business card was submitted into evidence, which reads "Armando Osuna, Professional Room Additions & Home Repairs" (JT 3).

The video also raises the issue of whether Claimant was working for himself both while he was employed at NASSCO and afterward. The video shows Claimant loading a red truck, which appears to be his work truck. Employer presented three witnesses – Carlos Anzaldo, Vanessa Rodriguez, and Francisco Javier Rodriguez – who had been tenants in Claimant's apartment complex.[8] These witnesses testified that since approximately 1998, they saw Claimant loading his red truck in the morning and leaving the apartment complex, and returning in the late afternoon or early evenings (TR 553-56, 589-90, 630). They reported that Claimant was dirty when he returned home (TR 592, 631). Mr. Anzaldo also testified that he had a conversation with Claimant in which Claimant offered his brother a job (TR 558). When Mr. Anzaldo said that his brother was receiving unemployment checks, Claimant said that he would pay him in cash so that he would not have to report the earnings, and that he himself was getting unemployment benefits, but was not concerned as long as Employer did not discover that he was also working (TR 559).

On his LS 200 form completed in August 1999, Claimant did not report any earnings from contracting work (EX 28, at 281). Similarly, at his deposition, Claimant testified that he had only worked as an apartment manager since his termination from employment with NASSCO, and had performed no other work (EX 30, at 83). However, at the hearing in July 2000, Claimant admitted that he had worked as a contractor since about 1996 or 1997 (TR 135-36). He admitted at the July hearing that he had not answered truthfully at his deposition because he wanted to receive disability benefits (TR 146-47). Despite this admission, Claimant again changed his testimony at the December hearing, stating that he had only recently begun working as a contractor, and that he had bought the red truck in 2000 and had his business cards made only four months before the December hearing (TR 670-71).

The three witnesses also testified that Claimant had been the manager at their apartment complex since approximately 1996. Mr. Anzaldo stated that Claimant told him to report needed repairs to him. Claimant also served eviction notices (TR 569, 577). Ms. Rodriguez stated that she saw Claimant painting, fixing pipes, cleaning the staircases, sweeping, and cleaning the grounds (TR 587-88). Mr. Kingman also testified that Claimant had borrowed a 25 foot "tree trimming pole" from him and that he observed Claimant trim a tree at his apartment complex (TR 228-29). He witnessed Claimant hold the tool over his head and saw the tree branches for about an hour. Mr. Kingman and Mr. Aguilar also testified that Claimant told them he was the apartment manager at his complex (TR 187, 230).

Claimant himself testified exceedingly inconsistently regarding whether he in fact managed the

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[8] These witnesses failed to appear at the July 2000 hearing, and only testified when compelled to do so by the Chief Judge of the U.S. District Court.

apartment complex. He repeatedly told his doctors he was not working at all. On an LS 200 form completed on August 30, 1999, Claimant stated that he had been employed at Bayview Apartments since August 1995, receiving free rent worth $517 a month (EX 28, at 281). At his deposition, he stated that he had managed the apartment complex since 1996, then quickly changed his answer to 1999 (EX 31, at 21). However, he later stated that he had received free rent since 1995 (EX 31, at 33). He said that he worked about four hours a day as the apartment manager. He also stated at his deposition that he did no repairs on the property, but that a separate management company performed the maintenance, although he could not remember the company's name and did not provide the information after the deposition as agreed (EX 30, at 23-24). He further stated that his wife did not work, but was a "housewife" (EX 31, at 26). At the July 2000 hearing, Claimant changed his testimony, insisting that his wife managed the apartment complex and he only helped her occasionally (TR 89, 104-05). However, later in the hearing, when asked if he knows Francisco Rodriguez, Claimant responded, "Yes. He's one of *my* tenants" (TR 108) (emphasis added). Asked if he knew Vanessa Rodriguez, he responded, "Yes. One of *my* tenants" (TR 108) (emphasis added). In addition, despite his adamant hearing testimony that his wife managed the apartment, he stated in his post-hearing brief that the complex is "managed by Claimant and his wife," which admits that Claimant at least co-manages the apartment. *See Claimant's Post Trial Brief*, at 2. For the purposes of this claim, it is not particularly relevant whether Claimant manages the apartment alone or with his wife. What is relevant is the amount of work he did in the apartment complex and the frequency with which he has changed his story regarding his status as the building manager.

In addition to his alleged physical injuries, Claimant contends that he has become depressed from not being able to work since 1996, has suffered a psychiatric sequela to his industrial injuries, and is entitled to the costs of his mental health care. He began seeing Dr. Esparza, a psychiatrist, in November 1999 (CX 23). In his report, Dr. Esparza states that Claimant told him he had felt "frustrated, helpless and depressed" since his January 1994 injury to his shoulder and elbow (CX 23, at 1). Claimant stated that his depression had resulted in his violence toward his wife, a DUI arrest in 1995, and his fight at work in 1996. Dr. Esparza opined that Claimant's "psychiatric symptoms were predominantly caused as a result of his January 4, 1994 right shoulder and right elbow injury and that he is currently temporarily totally disabled as a result of this injury" (CX 23, at 4). He prescribed Zoloft and started seeing Claimant once
every two or three weeks.

At Employer's request, Claimant was examined by Dr. Ornish, also a psychiatrist, on July 25, 2000. Claimant had failed to appear for several previously scheduled appointments (EX 35, at 204). Dr. Ornish completed a report and testified by deposition following the July 2000 hearing. He reviewed Claimant's medical records, Claimant's deposition, Ms. Gill's vocational rehabilitation report, witness statements taken by Employer's private investigator, the video of Claimant working, and Claimant's personnel records in forming his opinion (EX 35, at 205). Curiously, Dr. Ornish credited the witnesses' statements to refute Claimant's statements, although the doctor did not personally meet

the witnesses to evaluate their truthfulness, and the statements were not written by the witnesses and were not sworn. Dr. Ornish concluded that Claimant was malingering, but that he also had alcohol-dependence that was in remission and antisocial personality traits (EX 35, at 218). He based his diagnosis of alcohol dependence on Claimant's communication to him of a past significant drinking habit, two DUI arrests, and present attendance at Alcoholics Anonymous meetings (Ex 35, at 207-08; 233-34). He found Claimant to exhibit antisocial personality traits based on his DUI arrests, two arrests for domestic violence, his termination for fighting at NASSCO, "his prevarications in the instant claim," and his "allegedly killing a tenant's cat"[9] (EX 35, at 234).

Based on the LS-208 forms in the record (EX 5, 42) the employer has paid compensation to the claimant as is stated in the following chart, which is arranged chronologically:

Dates(s)	Weekly Rate	Amount Paid	Reason
1/5/1994	$327.88	$46.84	Total Disability
4/11/1994 - 6/5/1994	327.88	2,623.04	Total Disability
8/4/1995 - 8/6/1995	327.88	140.52	Total Disability
10/12/1995 - 10/30/1995	406.53	1,103.44	Total Disability
8/15/1996 - 9/2/1996	406.53	1,103.44	Total Disability
2/6/1997 - 2/22/1998	327.88	17,892.88	Total Disability
2/23/1998 - 5/3/1998	327.88	3,278.80	Total Disability
5/4/1998 - 5/18/1998	140.00	300.00	Partial Disability
6/16/1998 - 11/15/1998	327.88	7,166.52	Total Disability
11/16/1998 - 7/23/99	298.36	10, 655.71	Vocational Rehabilitation
7/24/1999 - 8/7/1999	160.00	1325.71	Partial Disability
8/18/1999 - 2/20/2000	406.53	10, 860.16	Total Disability
2/21/2000 - 5/14/2000	140.00	1,680.00	Partial Disability
		$58,177.06	

Payments at a weekly rate of $327.88 are based on the January 4, 1994 average weekly wage; payments at a weekly rate of $406.53 are based on the October 12, 1995 average weekly wage. The basis of the $298.36 weekly rate is not apparent; and for the period after October 30, 1995, it is unclear for which injury compensation was being paid or whether the payments were for temporary or

[9] Employer presented a surprising amount of testimony regarding Claimant's allegedly killing the Rodriguez's cat. While it is certainly a disturbing prospect, whether or not Claimant killed the Rodriguez's cat is irrelevant to this claim. Further, there was absolutely no reliable evidence that Claimant actually did so.

permanent disability.

B. Discussion

Claimant contends that he is entitled to compensation for an injury to his right shoulder on January 4, 1994; a cumulative trauma injury to his right shoulder through November 1996; and a cumulative trauma injury to his right elbow through October 1995. He requests a *de minimis* award for his January 4, 1994 shoulder injury, or alternatively, that all permanent disability to the shoulder be ascribed to his January 4, 1994 injury (rather than to a cumulative trauma through November 1996). He requests compensation based on loss of wage-earning capacity due to his cumulative trauma to his shoulder. He requests compensation for a 20% impairment of the upper extremity due to cumulative trauma to his right elbow through October 1995 per Dr. Levine's rating, or alternatively, compensation for a 10% impairment of the upper extremity per Dr. Averill's rating. He further requests compensation for various periods of temporary total disability throughout the past six years. Finally, he requests that Employer pay for treatment for a psychiatric sequela injury, although he does not allege that any compensation is due for this injury.

Employer contends that Claimant failed to provide timely notice and filing of his alleged cumulative trauma injuries through November 1996 as required by §§12 and 13 of the Act.[10] Employer states that Claimant is fully capable of performing the work of a shipfitter in the maintenance department, which was his job at the time of his termination, and is therefore not entitled to compensation under §8(c)(21). Finally, Employer asserts that under §8(j), Claimant has forfeited his right to compensation from at least 1997 to the present because he knowingly and willfully omitted or understated his earnings on his LS-200 forms.

Before the substance of this claim can be discussed, it must be noted that, as Employer pointed out at the hearing and in its post-hearing brief, this case largely turns on Claimant's credibility.

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[10] Employer states that Claimant failed to provide timely notice and filing of his 1996 cumulative trauma injury as required by §12 of the Act (EX 1; EX 4; CX 1-3). Section 12 requires a claimant to give notice of an injury within 30 days after the date of injury or 30 days after the employee is aware of the relationship between the injury and his employment. Failure to give notice will not bar a claim if the employer has knowledge of the injury, if the employer has not been prejudiced by the failure, or if the failure is excused on specific grounds set forth in the statute. 33 U.S.C §12(d). Section 13 requires a claimant to file his claim within one year after the injury. This decision does not address the issue of timely filing and notice of the cumulative trauma injury through November 1996, because I have found that Claimant's shoulder injury results from his January 4, 1994 accident (*see* discussion, *infra*).

As should have become clear in the background section of this decision, Claimant's testimony and his statements to doctors and vocational rehabilitation counselors were self-serving and opportunistic. The inconsistencies of his statements and his random "lapses" in memory are too voluminous to list. However, some notable examples are as follows:

! Claimant repeatedly changed his testimony regarding whether he managed his apartment complex;

! Claimant stated that his elbow pain began in 1990, in 1992 and after and as a result of January 4, 1994 injury (TR 121, 147, 149; CX 14, at 99; CX 23, at 4);

! At various times, Claimant described his pain as generally between an 8 and 10 on a scale of 10 (EX 31, at 11; EX 35, at 235), and stated he could not lift a piece of paper without pain (EX 31, at 113), even though he admitted that he had been performing contracting work as early as 1996;

! Claimant insisted that he only directs the men who work for his contracting company, although the surveillance video shows him working alongside several other men for a full day;

! Claimant admitted to testifying falsely regarding his contracting work because he did not want to lose his disability compensation;

! Claimant contended at various time that he could not speak English well, although he showed absolutely no difficulty in understanding the questions directed to him at the hearing, attended four years of high school in the United States, passed college courses taught in English, told Ms. Gill that English was his primary language, and impressed Mr. Cruz with his fluency;

! Claimant repeatedly could not remember facts that could be adverse to his interests, such as whether he worked after his termination and how much money he earned, whether he ever filed for unemployment, and remarkably, whether he had ever been in a motor vehicle accident.[11]

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[11] At his deposition, Claimant stated that he did not remember ever being in a motor vehicle accident. When pushed slightly on this issue, he said he was in fact in a motor vehicle accident. When asked what kind of vehicle it was, he stated "I don't remember. It was a car" (EX 31, at 66). When asked if he had ever been in a motorcycle accident, he specifically stated that he had never owned a motorcycle and had never been in a motorcycle accident (EX 31, at 118). At the hearing in July 2000,

! Claimant, when he first saw Dr. Greenfield in late 1994, told Dr. Greenfield that he does not drink (CX 13, at 10), yet in both 1994 and 1996 claimant was arrested for driving under the influence of alcohol, was also arrested twice for domestic violence, and was ordered by a court to attend Alcoholics Anonymous meetings (*see* TR 100-01; CX 23, at 1; EX 35, at 207).

As these examples and multiple others show, Claimant has little regard for the truth. His statements – whether in the form of testimony or information given to doctors and other professionals – lack credibility. Moreover, any opinions or diagnoses based on Claimant's representations and subjective complaints of pain also lack credibility, because they are based on an unreliable source. This premise guides the analysis of this claim.

1. Causes of Claimant's Injuries: Natural Progression vs. Cumulative Trauma

Although both parties argue the issue in their post-hearing briefs, the parties stipulated that Claimant sustained a cumulative trauma injury to his elbow through October 10, 1995. I have accepted their stipulation, and disregard the further argument provided in the briefs. Still, there is no stipulation that Claimant sustained a cumulative trauma injury through 1996, and this injury must be established. It is the Claimant's burden to establish that his injury occurred as alleged.[12]

Dr. Levine specifically stated that "[it] is obvious that Mr. Osuna did sustain cumulative trauma carrying out his work activities through November 9, 1996" (CX 12, at 5). At his deposition, the doctor explained that he based this conclusion on "the history provided by the patient," his physical examination, and Claimant's medical records indicating a progressive increase in symptoms that culminated in his 1997 shoulder surgery (CX 26, at 9). He stated that Claimant initially had an AC tear in January 1994, and as he continued his work activity, he had "a progression from acromioclavicular separation to an impingement requiring surgery" (CX 26, at 16). He stated that this situation is different from a natural progression of the initial separation, because impingement syndrome is "almost the

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he repeated his testimony regarding the car accident. However, when asked explicitly whether he had been in a motorcycle accident and referred to his medical records on the accident (EX 7, at 27-28), Claimant stated "I probably did in a motorcycle," and then recalled his injuries and where he was treated (TR 151). While Claimant's accident has no bearing on his injuries in this claim, his testimony on the accident is quite telling regarding his veracity.

[12] In either event, Claimant's injury to his shoulder is compensable under the Act. It appears that the only consequence of finding a cumulative trauma injury rather than a natural progression of the 1994 injury is that any compensation to which Claimant would be entitled would be based on a later – and presumably higher – average weekly wage.

reverse" of an AC tear (CX 26, at 16).

Dr. Dodge opined in 1999 that Claimant had one shoulder injury and one elbow injury attributable to "continuous trauma" (EX 36, at 251). However, he later stated that all of Claimant's injuries developed from his January 1994 accident. He stated that Claimant performed his regular work between January 1995 and November 1996 and there was no indication that Claimant's condition was deteriorating or that he was sustaining further trauma (EX 30, at 311). However, Dr. Dodge's opinion is impeached by the parties' stipulation that the claimant did sustain a cumulative trauma injury to his elbow by October, 1995.

Dr. Averill opined that Claimant developed chronic bursitis in his right elbow "as a result of cumulative trauma injury reported in 1992" and that his shoulder problems were due to his fall in 1994 (EX 14, at 99)(emphasis added).

Based on this medical evidence, I find that Claimant did not sustain a cumulative trauma injury through November 1996 to either his shoulder or elbow. Dr. Levine is the only medical expert whose opinion supports Claimant's position. But although Dr. Levine stated that Claimant sustained two injuries to his shoulder – one from his fall in 1994 and one from cumulative trauma – his explanation is confusing and ultimately not persuasive. Moreover, his opinion is based substantially on Claimant's representations, and thus is inherently unreliable. Similarly, Claimant's reports of injury to his elbow differ virtually every time he discusses it. Without a stipulation from the employer to support a cumulative trauma injury after October, 1995, there is no reliable basis to find that a cumulative trauma injury occurred subsequent to that date. Therefore, I find that Claimant has suffered two injuries: a nonscheduled injury to his shoulder from his work-related injury in January 1994, and a scheduled injury to his elbow resulting from cumulative trauma through October 10, 1995.

2. Nature and Extent of Disability

The parties do not dispute that Claimant sustained a compensable injury to his shoulder on January 4, 1994; and since I found that he did not sustain a cumulative trauma injury to his shoulder, any disability resulting from Claimant's shoulder pain results from this injury. To make a prima facie case of total disability, Claimant must show that he cannot return to his regular and usual employment due to his work-related injury. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984). A claimant's usual employment is his job at the time he was injured. The parties dispute whether Claimant is capable of performing his regular work, and dispute the requirements of Claimant's regular work.

Employer draws a distinction between the work of a shipfitter in the yard and a shipfitter in the maintenance department, stressing that the former is more physically demanding. After reviewing the evidence and hearing testimony, I accept that the two jobs' requirements differ, that Claimant was

employed as a shipfitter in the maintenance department, and that Employer

had no intention of transferring him at the time of his termination for fighting.[13] Claimant's job in the maintenance department required him to perform overhead work, use grinders and jackhammers, and lift up to 90 pounds, although employees were instructed not to lift anything beyond their capacity and Employer provided equipment to lift some of the heavier materials.

The evidence indicates that, at the time that he was terminated for fighting, Claimant was fully capable of performing his regular work. Claimant never complained about shoulder pain or any inability to complete his work. Other workers and his supervisors did not observe him to be in any pain. Mr. Aguilar even testified that Claimant was able to perform overhead work for extended periods of time without complaint or apparent difficulty. Claimant did not go to NASSCO's medical dispensary complaining of shoulder or elbow pain in his last year of employment, although he did go to the medical dispensary with other complaints. After his termination, Claimant filed a grievance to return to his regular work indicating that he did not believe the work was beyond his capacity. Significantly, Claimant's treating physician at the time of his termination did not restrict Claimant from his regular work despite treating Claimant for shoulder and elbow pain (EX 11, at 52-54). Therefore, at the time Claimant was terminated, he was fully capable of performing his regular work and is entitled to no compensation for the months immediately following his termination.

Subsequently, Claimant underwent surgery on his shoulder and several surgeries on his elbow. Despite this apparent progression in his medical condition, Employer maintains that Claimant is currently capable of performing his regular work. Ms. Gill was familiar with the work requirements of a shipfitter in the maintenance department, and stated that the work is within the medical restrictions of all of the doctors who examined Claimant. After watching the video of Claimant, Dr. Dodge believed that Claimant was fully capable of performing his previous work and had no medical restrictions. Dr. Averill also stated in 1998 that Claimant could perform his regular duties if they did not include very forceful gripping and pulling and very heavy lifting (EX 14, at 99-101).

Dr. Levine stated that Claimant could not perform his regular duties. However, I reject Dr. Levine's assessment of Claimant's physical abilities. Dr. Levine specifically testified that he believed that Claimant was a credible historian, and much of his evaluation of Claimant was based on subjective

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[13] I reject Claimant's contention that he was improperly terminated because of his disability, as he has provided no support for this theory.

findings. However, since I do not find Claimant to be a credible historian, I cannot give significant weight to a physician's opinion that is so dependent on Claimant's representations of pain. Dr. Levine found that Claimant had a restricted range of motion in his shoulder in late 1999, and did not test this range of motion again (CX 26, at 63). His finding is inconsistent with Dr. Dodge's finding of no loss of range of motion in the shoulder in 2000. Further, I find it troublesome that Dr. Levine watched the video of Claimant and even noted that Claimant appeared to be in no pain or discomfort, but maintained that Claimant had a 20%

impairment to the right upper extremity due to his elbow injury and was unable to perform his usual work at NASSCO. Dr. Levine stated at his deposition that none of the work on the video fell outside the restrictions he placed on Claimant (CX 26, at 24). He also stated that his restrictions were prophylactic, meaning that Claimant might be able to perform more strenuous activity but if he did so consistently he would aggravate his injuries (CX 26, at 21). However, Claimant's complaints of pain around the time in which the video was taken are inconsistent with his activities on the film, and I find it difficult to accept that Dr. Levine had absolutely no change in his assessment of Claimant's physical abilities after viewing the film.

Therefore, based on the evidence of record, I find that Claimant remains capable of performing his work at NASSCO in the maintenance department. As such, although he suffered a work-related injury to his shoulder, and received compensation from the employer for various periods of disability, he is not entitled to compensation for permanent partial disability under §8(c)(21).

Although Claimant is not entitled to disability compensation for his shoulder injury, a date of permanency should be determined. A permanent disability is one that has continued for a lengthy period and appears to be of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Dr. Averill declared Claimant's condition permanent and stationary on May 23, 1994, and gave him a disability rating for his shoulder. From the extensive record of medical treatment in this case, Claimant clearly had pain in his shoulder following this date, and had surgery on his shoulder several years later. However, his condition appears to have stabilized and become permanent on May 23, 1994, when Dr. Averill initially rated his condition, as is shown by his return to work for 2 ½ years until he was fired in November 1996. That Claimant's condition might have gotten worse subsequent to his termination does not necessarily conflict with his reaching maximum medical improvement in 1994.

In regard to his right elbow, the parties have stipulated that Claimant suffered a cumulative trauma injury through October 10, 1995. They do not extensively address the date that Claimant reached maximum medical improvement for his elbow injury, however. Claimant states his condition became permanent and stationary on March 10, 1996, as per Dr. Greenfield's report (EX 12, at 76-

77). *See Claimant's Post Trial Brief*, at 9.[14] However, Claimant's elbow condition does not appear to have stabilized after he recovered from the first operation. Rather, he kept going for treatment for his elbow injury and underwent two additional surgeries after this date. Dr. Levine stated that Claimant's condition had become permanent and stationary as of June 30, 2000 (CX 12, at 11). Dr. Dodge stated that Claimant's condition had become permanent and stationary as of April 28, 2000 (EX 30, at 306). Because there is no evidence that Claimant's condition improved after April 28, I find that Claimant reached maximum medical

improvement on April 28, 2000, as per Dr. Dodge's report.

Claimant maintains that he has a 20% impairment to his right upper extremity due to his elbow injury, in accordance Dr. Levine's 1998 evaluation which he reiterated in his June 30, 2000 report following Claimant's recovery from his most recent surgery. Dr. Levine based this rating on Claimant's loss of grip strength (CX 12, at 17). Dr. Levine felt that he obtained accurate readings of Claimant's grip strengths, but other physicians found that the Claimant did not give a full effort when they conducted their own tests. Dr. Averill stated in 1994 that Claimant was not putting forth a full effort[15] (EX 14, at 88); and Dr. Dodge noted in April, 2000 that Claimant had not "put forth a complete effort in grip strengths of the right hand" (EX 30, at 311). It is notable that Dr. Dodge reached this conclusion *before* he viewed the surveillance tape and therefore before he had reason to question Claimant's credibility based on that tape. I reject Dr. Levine's rating, as the doctor specifically stated that he trusted Claimant's subjective representations, which I do not; because other doctors found that Claimant did not put forth full efforts in his grip strength tests and Dr. Levine does not consider this fact in reaching his rating; and because the rating is significantly higher than the ratings of Drs. Averill and Dodge, whose opinions, despite their faults, I find more credible in this case.

Claimant states that if Dr. Levine's rating is unacceptable, then Dr. Averill's impairment rating should be used. Claimant states that Dr. Averill gave him a 10% impairment rating. In fact, Dr. Averill clarified that only half of this impairment rating was attributable to Claimant's elbow injury (EX 14, at 103). But Dr. Averill arrived at this rating in June 1998, which was before Claimant's most recent surgery and therefore before Claimant's condition had become permanent and stationary.

Dr. Dodge also assigned Claimant an impairment rating. He stated that Claimant's condition

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[14] In this report Dr. Greenfield actually states that Claimant was permanent and stationary as of February 27, 1996.

[15] Dr. Averill was evaluating Claimant's grip strength to assess his shoulder injury, not his elbow, but his belief that Claimant was not putting forth a full effort is relevant to whether Claimant put forth a full effort in grip strength tests generally.

was permanent and stationary on April 28, 2000, and reported that Claimant had a 10% impairment, although he noted that Claimant had not put forth a complete effort in his grip strength tests. After viewing the video, which was filmed only 11 days before his April 2000 examination of Claimant, Dr. Dodge stated Claimant had no impairment of the right upper extremity.

Considering that Claimant has had three operations on his elbow and a history of bursitis and ulnar nerve irritation, it is difficult to believe that the Claimant has no ratable impairment to his right upper extremity; and despite Claimant's lack of credibility, Dr. Dodge's revised assessment of no impairment appears too low. Because Dr. Averill's impairment rating was given before Claimant reached maximum medical improvement, and Dr. Levine's rating is not credible, as discussed previously, I credit Dr. Dodge's original 10% impairment rating to the

right upper extremity due to his elbow injury, which is compensable under §8(c)(1).

Finally, Claimant requests a *de minimis* award for permanent partial disability for his shoulder injury, in accordance with *Metropolitan Stevedore Co. v. Rambo (Rambo II)*, 521 U.S. 327, 117 S. Ct. 1953 (1997). Under *Rambo II*, if a claimant with a permanent impairment but no compensable loss of wage-earning capacity can demonstrate that there is a significant possibility that he will incur a loss of wage-earning capacity in the future due to that injury, the claimant may receive a nominal award of benefits. By receiving a nominal award for permanent partial disability, the claimant continues to receive weekly benefits, forestalling the one year deadline for filing a petition for modification under §22 of the Act.

Although claimant requested a *de minimis* award, he did not do anything to show that *Rambo II* is applicable in this case. Rather, all he states is that he is able to return to work without a loss of wages (*see Claimant's Post Trial Brief* at 10). If that is the only showing a claimant has to make to be entitled to a nominal award, than nominal awards under *Rambo II* would be the rule, not the exception. Since Claimant fails to allege, let alone prove, that there is a significant potential he will sustain a loss of wage-earing capacity in the future due to his 1994 shoulder injury, a nominal awarded is inappropriate.

4. Psychiatric Sequela Injury

In addition to his physical injuries, Claimant states that he has suffered a psychiatric sequela injury. Dr. Esparza's November 1999 report was submitted to support the contention that Claimant's need for psychiatric treatment stems from his work injuries (CX 23, at 4). Unfortunately, Dr. Esparza's report suffers the same defect as others in this case – his diagnosis is predicated on Claimant's representations and subjective complaints. Even in reviewing Dr. Esparza's report alone, it becomes evident that Claimant made several statements to the doctor that were inconsistent with other evidence

and his own testimony. He stated that his wife managed his apartment complex. The overwhelming weight of the evidence shows that he manages his apartment complex. He stated that he has been unable to work since 1994. He admitted in the process of this claim that he has worked since at least 1997, and other witnesses' testimony and the video confirm this. He apparently told Dr. Esparza that all of his injuries resulted from his January 4, 1994 fall, which contradicts his claim before this court (CX 23, at 1). Therefore, Dr. Esparza's conclusion that Claimant's depression, alcoholism, and physical violence toward his wife and others result from his January 4, 1994 injury at work is entitled to little weight, as it is based substantially on Claimant's representation to him that his work injury is the source of his depression.

I note, however, that my decision to deny benefits for Claimant's mental health treatment is not based on the report and deposition of Dr. Ornish, Employer's evaluating psychiatrist (EX 43). I found Dr. Ornish's report to be prosecutorial in tone, rather than an unbiased, objective evaluation of Claimant's mental condition and its causes. I was particularly troubled by his reliance on witness statements to rebut Claimant's statements. Dr. Ornish explained at some

length at his deposition that forensic psychiatrists often seek corroborating data. This proposition, in itself, is acceptable. However, Dr. Ornish did not rely on third party interviews, police reports, or similar sources identified in the professional texts he presented to support his methodology (EX 43, Attachments 2-7). The statements were not sworn, and the doctor had never even met the witnesses to evaluate their veracity. For the most part, I have credited these same witnesses' statements over Claimant's. However, I have only done this after evaluating every witness's testimony on both direct and cross examination and having the opportunity to question the witnesses myself. Dr. Ornish was willing to credit written statements over Claimant's reports to him with no explanation of why he did so. Therefore, while Dr. Ornish's report is admissible, it is not entitled to any weight.

5. Section 8(j)

At the hearing, the parties agreed to keep the record open for the filing of LS-200 *Report of Earnings* forms as Joint Exhibit 2 (TR 533). These forms were filed and admitted into evidence. Claimant stated in his brief that Employer filed these reports "unilaterally," and attached other LS-200 forms to his post-hearing brief. While it is not true that Employer filed the LS-200 forms unilaterally, as the parties specifically agreed to keep the record open for this purpose at the hearing, Employer has not objected to the completed LS-200 forms that Claimant has submitted. Therefore, these LS-200 forms will be admitted as Claimant's Exhibit 28.

Employer states that Claimant has forfeited his right to compensation, if any, from at least 1997 through the present date because Claimant willfully understated his earnings on an LS-200 Form and subsequently failed to complete LS-200 forms sent to him by Employer. Claimant asserts that

Employer has presented no evidence regarding when the LS-200 forms were sent to him, so Employer cannot show that the forms were not returned in a timely fashion. Claimant also seems to argue that he did not omit earnings on the LS-200 forms he completed.

Section 8(j) provides that "an employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment." 33 U.S.C. § 908(j)(1). An employee who fails to report such earnings upon request, or who "knowingly and willfully omits or understates any part of such earnings . . . forfeits his right to compensation with respect to any period during which the employee was required to file such report." 33 U.S.C. § 908(j)(2). Although §8(j) is not explicitly limited to compensation resulting from a loss of wage-earning capacity, since a Claimant's compensation for permanent partial disability due to a scheduled injury is unrelated to the claimant's post-injury earnings, I hold that §8(j) is inapplicable to compensation under §8(c)(1) of the Act for Claimant's injury to his right elbow.

Employer mailed Claimant an LS-200 form requesting earnings information from January 1, 1999 to "present," which Claimant completed on August 30, 1999 (EX 28; JT 2). Claimant reported that from August 1995 to "present" he had received "free rent worth about $517 per month" (EX 28; JT 2). Claimant rightly points out that Employer fails to indicate when it mailed

the form to Claimant, so there is no evidence that Claimant failed to complete it in a timely fashion. However, Claimant only reported his free rent on the form, and made no mention of his contracting work, which he admitted to performing as early as 1997. Thus, Claimant has clearly underreported earnings for the period requested by Employer on the form, and his compensation for the period of January 1, 1999 through August 30, 1999 is subject to forfeiture. I do not find that he forfeits compensation for periods prior to January, 1999 even though he underreported his earnings for earlier years because Employer never requested that he report his earnings for any period before January 1, 1999.

In addition, the parties have filed a joint exhibit showing that on April 19, 2000 Employer mailed to Claimant LS-200 forms covering the periods August 1, 1999 to December 31, 1999 and January 1, 2000 to April 10, 2000, which Employer states Claimant never completed. On June 1, 2000, Employer mailed to Claimant an LS-200 form covering April 10, 2000 to the present. Claimant submitted a completed form for the period January 1, 2000 through June 29, 2000, which he signed on June 29, 2000 (CX 28). It is apparent that the original period ending date in box 6 of that form, over which "6/29/00" was written, was "4/10/00", confirming that Claimant received this LS-200 Form from the employer. Regardless, Claimant has submitted no evidence that he mailed this completed form back to Employer. In the absence of any evidence that Claimant responded to Employer's requests, I

find that Claimant has failed to report his earnings between August 1, 1999[16] and June 1, 2000, and his compensation is subject to forfeiture for this period as well.

In accordance with the statute, any compensation already paid which Claimant has forfeited shall be recovered by a deduction from any compensation which is still payable to the Claimant in an amount and on a schedule determined by the District Director.

ORDER

IT IS ORDERED that:

1. Employer shall pay to Claimant compensation for a 10% impairment of the right upper extremity as a result of Claimant's cumulative trauma injury to the elbow commencing on October 10, 1995 based on an average weekly wage of $609.80. Interest shall be paid on all unpaid compensation from the date due until paid in accordance with 28 U.S.C. §1961(a).

2. Employer shall receive credit for all compensation already paid.

3. Claimant has forfeited his right to any compensation, other than for permanent partial disability for his right elbow injury, between the dates of January 1, 1999 and June 1, 2000.

4. Employer shall provide medical benefits for Claimant's January 4, 1994 shoulder injury and Claimant's cumulative trauma injury to the elbow through October 10, 1995.

A
JEFFREY TURECK
Administrative Law Judge

[16] There is a short overlap over the periods covered by the LS-200 forms. Information for August 1999 was requested twice by Employer.